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OWEN KOH TAT GIN v. DIANA LEE CHENG SEE

HIGH COURT MALAYA, SHAH ALAM
HAYATUL AKMAL ABDUL AZIZ J
[PETITION NO: 33-101-02-2019]
6 APRIL 2021

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FAMILY LAW: *Matrimonial property – Assets – House – House bought before marriage between husband and wife – Husband transferred half share in house to wife during marriage – Consideration for transfer was 'love and affection' and for tax benefits – Application by husband for transfer of wife's half share in house to him upon divorce – Whether house matrimonial home – Whether wife made any contribution towards purchase of house – Whether contribution in kind – Law Reform (Marriage and Divorce) Act 1976, s. 76(1) & (5)*

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There were two applications, namely: (i) an application by the petitioner husband ('PH') for, *inter alia*, the transfer of the respondent wife's ('RW') half share in the house in Valencia, Sungai Buloh, Selangor ('Valencia') to PH ('encl. 12'); and (ii) an application by RW for Valencia to be sold at a market value of RM2.1 million to RM2.4 million and other related prayers ('encl. 19'). PH and RW were married and blessed with two daughters. RW initiated divorce proceedings against PH in Abu Dhabi where an order for divorce was pronounced. The divorce was later registered in Malaysia. In supporting his application in encl. 12, PH argued that: (i) shortly before marrying RW, PH had purchased and renovated Valencia and registered it solely under his name; (ii) PH paid the purchase price using his own savings and RW did not provide any financial contribution towards the purchase of Valencia; (iii) the sale and purchase agreement did not include RW's name as the joint owner and the notices of utility bills and quit rent were paid by PH; (iv) Valencia was not the matrimonial home since they stayed there for several months before renting it out and moving to Abu Dhabi where they purchased, under joint names, and resided in, a condominium ('Al-Zenia') in Abu Dhabi; (v) a year after their marriage, PH transferred a half share (50%) of Valencia to RW as a security for his growing family and his job's risky nature as an airline pilot. It was not intended to be a gift as, according to PH, Valencia was purchased for investment purposes to be used to pay for their children's tertiary education. RW objected to PH's application in encl. 12. According to RW, (i) Valencia was bought as a matrimonial home; (ii) they purchased Valencia before PH was offered a job in Abu Dhabi, where they moved to live in Valencia after the renovation works were completed; (iii) it was their plan all long to continue living there had PH not been offered the job in Abu Dhabi; and (iv) RW sacrificed her job and career to care for the family and, after moving to Abu Dhabi, PH transferred the half share of Valencia to her as his wife when their relationship was still good. The consideration was undeniably for love and affection as his wife and mother to his children.

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Held (dismissing encl. 12 in part; allowing part of encl. 19 in part):

(1) Section 76(1) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA') empowers the court, when granting a decree of divorce or judicial separation, to apply equality in the division of matrimonial assets acquired during the marriage after considering the extent of contributions made by each party in money or in-kind. Section 76(5) of the LRA provides that references to assets acquired during a marriage include assets owned before the marriage by one party, which have been substantially improved during the marriage by the other party or by their own joint efforts. It was undeniable that RW did not improve the physical aspect of Valencia but it was not disputed that she sacrificed her career and laboured efforts in caring for the family. (para 22)

(2) RW resigned from her job and became a full-time housewife, taking care of the family and gave birth to the first daughter, giving marital life use and enjoyment to Valencia, all of this, when considered as a whole, constituted her contribution in-kind. They had two minor children and had been married for ten years. The duration of five months stay before moving to Abu Dhabi when taken with the facts leading to Valencia's purchase and after clarifying that the intent and moving to Abu Dhabi was to further the career of PH, did not alter the position of Valencia as a marital asset. (para 22)

(3) PH's assertion, that he never had the intention to gift the half share in Valencia to RW and it was only a security for his growing family and his job's risky nature, was merely a bare averment with no evidence to support his veracity. Moreover, if anything were to happen to PH, Valencia would still be inherited by the survivors (the children and RW). If it was for the children, why transfer at all since the law of property inheritance and succession applied to see to the children's welfare. (para 22)

(4) As a duly registered proprietor of the half undivided share in Valencia, s. 340 of the National Land Code ('NLC') makes her title or interest indefeasible except when fraud or misrepresentation or registration was obtained by forgery or void instrument; or where it was unlawfully acquired. In the present case, there was no fraud and misrepresentation and neither was the title obtained by forgery. Therefore, the title conveyed to RW was indefeasible and her rights were protected under the scheme of the NLC. Under the NLC Torrens scheme, the NLC provides statutory rights for registered property owners. In the absence of compelling evidence to support his claim, PH was not allowed to come to the court to compel RW to transfer her half undivided share in Valencia back to him. PH himself could not even substantiate his claim, relying solely on bare averments and conjectures. He failed to satisfy s. 101 of the Evidence Act 1950. (para 24)

A **(5)** The correct order was to order for the sale of Valencia by auction to address this unnecessary deadlock with the proceeds of sale to be divided equally between the parties as registered proprietors of Valencia minus all expenses/costs incurred. (para 24)

B **Case(s) referred to:**
Balakrishnan Kaliappan v. Shameena Nathesan [2019] 7 CLJ 762 CA ***(refd)***
Hii Chan Seng v. Aida Balingan Baron [2011] 1 LNS 12 HC ***(refd)***
Lim Bee Cheng v. Christopher Lee Joo Peng [1996] 2 CLJ 697 HC ***(refd)***
Soo Ah Chong v. Tan Saw Cie & Ors [1996] 1 LNS 538 HC ***(refd)***
Theynarasi Selambaram v. Periasamy Chinnappan & Anor [2019] 1 LNS 818 HC ***(refd)***
C *Vikkaram Subramaniam v. Yogeswery Sarkgunalingam [2018] 1 LNS 39 HC* ***(refd)***
Wong Chong Kiew v. Lee Hock Seng [2019] 1 LNS 915 HC ***(refd)***
Wong Kim Foong v. Teau Ah Kau [1998] 1 CLJ 358 HC ***(refd)***
Yap Kim Swee v. Leong Hung Yin [1986] 1 LNS 127 HC ***(refd)***
Yap Yen Piow v. Hee Wee Eng [2016] 1 LNS 1060 CA ***(refd)***

D **Legislation referred to:**
Divorce and Matrimonial Proceedings Rules 1980, r. 56(2)(a)
Evidence Act 1950, s. 101
Law Reform (Marriage and Divorce) Act 1976, ss. 76(1), (2), (4), (5), 107(3), (4)
National Land Code, s. 340(2)(a), (b), (c)

For the petitioner - V Alahakone & Jayarajah Vijayamanohar; M/s Alahakone & Assocs
E *For the respondent - Aarolyn Yip; M/s Aarolyn & Co*

Reported by Lina E

JUDGMENT

F **Hayatul Akmal Abdul Aziz J:**

Introduction

[1] There are two applications for this court's determination:

(i) application by the petitioner husband ("PH" - encl. 12) for the transfer of the respondent wife's ("RW") half share in Valencia to PH and overnight access to the children of the marriage; and

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(ii) application by RW for Valencia to be sold at a market value of RM2.1m to RM2.4m and other related prayers.

H **[2]** These applications were heard simultaneously on 26 January 2021, and my decisions are as follows:

(i) Enclosure 12: I dismissed PH's application for the transfer of RW's undivided half share in the Valencia House but allowed his application for access to the children of the marriage. Dissatisfied with part of this decision, he has filed an appeal against this court's decision in dismissing his application for the said transfer.

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(ii) Enclosure 19: I dismissed part of RW's application but allowed her application for Valencia to be sold off *via* public auction or otherwise and the costs/proceeds of the auction to be born equally between the parties. Dissatisfied with part of the decision, PH has filed an appeal against this court's decision.

I wish to state at the outset that since both encls. (12 and 19) pertains similar subject matter, ie, Valencia property, it will be considered together, and my reasonings are as follows:

[3] For ease of reference, I reproduce the relevant applications filed by the parties as follows:

Enclosure 12 by PH:

(a) Bahawa Responden memindah milik half bahagiannya dalam harta Valencia kepada Pempetisyen dalam tempoh masa tiga puluh (30) hari dari tarikh Perintah ini;

(b) Bahawa sekiranya Responden gagal berbuat demikian, Pendaftar akan melaksanakan segala dokumen yang relevan bagi pihak Responden untuk melaksanakan urusan pindah milik tersebut kepada Pempetisyen.

Enclosure 19 by RW:

(i) Suatu perintah jualan oleh Mahkamah yang Mulia ini melalui lelongan awam atau lelongan swasta untuk menjual premis tersebut dan hasil jualan selepas menolak kos dan perbelanjaan akan dibahagi sama rata. Kos juga akan ditanggung sama rata.

[4] The relevant cause papers are:

Enclosure 12:

(i) enclosure 12: notice of application filed on 16 August 2019;

(ii) enclosure 13: PH's affidavit-in-support affirmed by Owen Koh Tat Gin on 8 August 2019;

(iii) enclosure 14: RW's affidavit-in-reply affirmed by Diana Lee Cheng See on 17 September 2019;

(iv) enclosure 17: PH's affidavit-in-reply affirmed by Owen Koh Tat Gin on 10 October 2019;

(v) enclosure 24: RW's affidavit-in-reply (2) affirmed by Diana Lee Cheng See on 24 October 2019;

(vi) enclosure 26: PH's affidavit-in-reply (2) affirmed by Owen Koh Tat Gin on 8 November 2019;

A Parties respective written submissions/replies/emails.

Enclosure 19:

(i) enclosure 19: notice of application dated 17 October 2019;

(ii) enclosure 15: RW's affidavit-in-support affirmed by Diana Lee Cheng
B See 8 October 2019;

(iii) enclosure 25: PH's affidavit-in-reply affirmed by Owen Koh Tat Gin on 8 November 2019;

(iv) enclosure 28: RW's affidavit-in-reply affirmed by Diana Lee Cheng See
C on 18 December 2019;

(v) enclosure 30: PH's affidavit-in-reply affirmed by Owen Koh Tat Gin on 24 January 2020;

(vi) enclosure 31: RW's affidavit-in-reply (3) affirmed by Diana Lee Cheng
D See on 10 February 2020;

Parties respective written submissions/replies/emails.

Brief Facts

[5] Parties underwent a traditional Chinese tea ceremony on 2 November
E 2007 and subsequently registered their marriage on 25 May 2009:

(i) From this marital union, they have two daughters Angelina (now aged 12+) and Annika (now aged 9+).

(ii) Shortly before his marriage to RW, PH had purchased a property at
F no. 12B, Elitis Mentari Valencia, Sungai Buloh, Selangor (referred as "Valencia") that was registered solely under his name, which he later renovated.

(iii) On 9 June 2008 (after the renovation), parties moved into Valencia.

(iv) By 9 May 2008, after the birth of their first child Angelina, RW resigned
G from her job as a manager with Air Asia and elected instead to become a full-time housewife.

(v) PH, a pilot with Air Asia, was subsequently offered a job as a pilot with Etihad Airways in Abu Dhabi, which he accepted, and departed from Malaysia in August of 2008.
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(vi) By November 2008, after staying in Valencia for five months, parties moved to and lived in Abu Dhabi. PH let out Valencia for approximately RM5,000 a month and used the revenue from the rental for the property upkeep.

I (vii) On 29 June 2010, PH decided to transfer a half share (50%) of Valencia to RW. PH claimed, this due to the risky nature of his job and to cater for the future security of his family since RW was then unemployed.

[6] In Abu Dhabi, after the birth of their second child Annika, PH purchased a condominium in 2013 ("Al-Zeina") in their joint names:

(i) He asserts that this was meant to be their matrimonial home at all material time as RW had chosen it.

(ii) They resided there from 2013 to January 2018, when after that RW and the children moved back to Penang.

(iii) He argued that RW is currently employed with Syarikat Flex in Penang, earning approximately RM5,500 a month.

RW had initiated divorce proceedings against PH in Abu Dhabi, where an order for divorce was pronounced on 29 August 2018:

(i) This divorce was subsequently registered in Malaysia *via* a court order dated 28 May 2019.

(ii) PH is currently based in Abu Dhabi and flies to Malaysia periodically once every month to spend time with his two daughters, with overnight access for a continuous period of two weeks.

Petitioner Husband's Submission (PH)

[7] In supporting his application, PH argued as follows:

(i) He purchased Valencia on 24 April 2007 (exh. "OKW3") before his marriage to RW on 25 May 2009.

(ii) RW never provided any financial contribution towards this purchase or its monthly maintenance costs.

(iii) He had allegedly paid for the purchase price using his savings which he accumulated while working in the United Kingdom as an investment banker for 15 years before working as a pilot with Air Asia, where he met RW.

(iv) The sale and purchase agreement ("SPA") for Valencia does not include RW's name as a joint owner, despite her allegation that they were planning to get married in March 2007, and Valencia was a purchase in anticipation of it.

(v) The assessment notices, utility bills and quit rent are all under his name solely and paid by him.

(vi) Valencia is not the "matrimonial home" since they stayed there for several months before moving to Abu Dhabi, where they resided in the Al-Zeina for five years.

(vii) Both parties never considered Valencia as their home, and it was promptly rented out.

(viii) RW made no contribution in monetary or in-kind on Valencia in the five months she lived there with their eldest daughter.

A (ix) He did not transfer half share of Valencia immediately to RW upon their marriage on 25 May 2009. It was only a year or so, on 29 June 2010, while residing in Abu Dhabi, where their second child was born.

B (x) He did this only as security for his growing family and his job's risky nature as an airline pilot. The consideration for the transfer was for "love and affection" and for tax benefits. It was not intended to be a gift, as alleged.

[8] I was pointed to *Lim Bee Cheng v. Christopher Lee Joo Peng* [1996] 2 CLJ 697; [1995] 4 MLRH 104, where it ruled:

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> The power of the court to order division of matrimonial asset under s. 76 is subject and subject only to those considerations prescribed therein and that conduct of the parties *via* spousal agreement is and has always been irrelevant.

D I was also referred to this court's decision *Vikkaram Subramaniam v. Yogeswery Sarkgunalingam* [2018] 1 LNS 39; [2018] 2 MLRH 260, that held:

> [18] ... RW had only stayed at the said property for two weeks because she refused to stay in the same house together with PH's parents. I find RW had just made a bare denial on these averments. However, at
E para 5B.1, RW acknowledged that there are no matrimonial assets acquired during her marriage to PH.
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> [19] ... the said property, which was irrefutably acquired by PH under his personal name before he was even married to RW, cannot be held out as being a matrimonial asset. It is not rebutted that the said property once belongs to PH's father, and it was also unrebutted that the said property
F was refinanced under PH's name before his marriage to RW. The SD filed by PH and his father clearly stated that the said property was refinanced under PH's name because of the financial problem faced by his father. It is unrefuted that the bills of the said property were still under the name of PH's father, and PH's parents are still staying in the said property. These facts taken together in the circumstances of this case do not
G support the proposition that it falls within the category of the matrimonial asset for division.

PH further argued that:

H (i) The facts of the present case are similar to *Vikkaram Subramaniam* (*supra*), where PH had purchased Valencia before his marriage to RW using his savings accumulated from working as an investment banker in the UK before he met and married RW in Malaysia.

(ii) The assessment notice, water bill, electricity bill, and quit rent are all under his name and, to date, are paid by him.

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(iii) RW had only stayed in Valencia for five months, too short for it to be called a matrimonial home.

(iv) Had he intended Valencia to be the matrimonial home, he would have included her name as a joint owner when the SPA was signed instead of only doing so two years later in 2010 when they were living in Abu Dhabi.

(v) He clarified that he did not purchase Valencia in anticipation of his marriage to the RW in April 2007. The "tea ceremony" with the RW was in November 2007, seven months later.

(vi) When he bought Valencia, he was finalising his divorce with his first wife, Sarah Chan, in the United Kingdom.

(vii) He married RW in August 2007 when informed that she was pregnant with their first child Angelina. The tea ceremony took place two months later (2 November 2007).

(viii) He claimed Valencia was purchased for investment purposes from his ample savings while working in the UK before being qualified as a commercial pilot, working with Air Asia.

(ix) Their marital home is the Al-Zeina, purchased in their joint names in Abu Dhabi.

(x) He is not able to give the RW a share of the rental he receives from Valencia every month as he fully utilises it to pay for the utilities, quit rent, assessment, and the repairs and upkeep of the said property (I find this argument is not probable considering that there are no utilities since it is rented out, quit rent and assessments are an annual affair, repairs and upkeeps depending on the type of issue arising).

(xi) RW's contribution in looking after the family's welfare took place the longest in Abu Dhabi, where they lived together for five years instead of the five months in Malaysia. It shows that Valencia was never intended to be the marital home.

(xii) Valencia cannot be considered as a matrimonial asset because:

(a) it was acquired before their marriage, and there was no substantial improvement done to it by RW;

(b) PH had no intention to use Valencia for a "current common purpose" as required by *Yap Yen Piow v. Hee Wee Eng* [2016] 1 LNS 1060 (CA) but instead for a "future purpose," namely to pay for their children's tertiary education.

(c) They moved into Valencia immediately after it was renovated. The cost of which was borne solely by him. There was absolutely no work for RW to do in the said property for five months apart from

caring for her newborn child with the assistance of a maid and PH's parents, who were with her until she left for Abu Dhabi to join him. Her contribution in Valencia, therefore, cannot amount to anything substantial to be considered by the court; and

(d) The Court of Appeal in *Balakrishnan Kaliappan v. Shameena Nathesan* [2019] 7 CLJ 762; [2019] 5 MLRA 40 held:

> It is of course specifically provided under s. 76(5) of the LRA that assets acquired during a marriage include the ones acquired before the marriage ... but which "have been substantially improved during the marriage by the other party or by their joint efforts".

Therefore "merely residing" in a property cannot confer proprietary rights on a party.

(xiii) RW's substantial contribution is when she took care of the family's welfare in Abu Dhabi at the Al Zeina for five years compared to the five months in Valencia. He acknowledges her contributions toward their family throughout their ten-year marriage. PH argues that he is not suggesting that the Al-Zeina is the sole matrimonial asset acquired during the marriage but merely argues that the Al-Zeina satisfies the criteria laid down in s. 76(1) and (2) of the Law Reform (Marriage and Divorce) Act 1976 ("LRA"). In contrast, Valencia does not for the reasons stated.

(xiv) RW unilaterally elected to commence divorce proceedings in Abu Dhabi while efforts to settle the divorce in Malaysia amicably were being pursued. The Abu Dhabi court ordered, among other things:

(a) PH to pay maintenance for RW and both children in the sum of approximately RM17,169 every month;

(b) PH to pay arrears in maintenance from 13 October 2016 to date in 2020 amounted to RM375,500;

(c) PH pays for the children's education at Wesley Methodist Pulau Penang (a private school), which will, in reality, is paid by Etihad (PH's employer) until the children complete their O-Levels; and

(d) PH not allowed to sell or rent out the Al-Zeina without first getting RW's permission.

(xv) He asserts that he has been providing RW and the children the same or similar standard of living they used to enjoy in Abu Dhabi despite them living in Malaysia, where the cost of living is so much lower.

(xvi) PH claims that RW has more than enough money to acquire a property of her own as she presently has a job earning RM5,500 every month, a roof over her head (rent-free), the children's education costs fully

paid every month by him, a lump sum of RM375,500 as ordered by the Abu Dhabi court, in addition to monthly maintenance of RM17,169. She intends to utilise her half share should Valencia be sold worth approximately RM1.2million, showing her greed.

(xvii) Whereas PH intends to sell Valencia in the future once the property prices improve and use the proceeds to pay for both his daughters' tertiary education, which will not be paid by his employer, Etihad. In *Yap Yen Piow v. Hee Wee Eng* [2016] 1 LNS 1060; [2017] 1 MLRA 389 at p. 404, the Court of Appeal said:

> In both the first and second categories, the paramount consideration will appear to be for the court to take into consideration the needs of minor children. That is to say, a portion or substantial portion of the assets must be reserved for the benefit of the children before the division takes place between the competing spouses. Decisions of courts in the past have not taken into consideration the courts' duty towards children. Most of the decisions favour one of the spouses as opposed to the children. We must emphasise here that the "minor children's" interest is a paramount consideration before apportioning the assets to the spouses.

(xviii) He, therefore, asks that this court compel RW to transfer her half share in Valencia back to the PH so that a portion of the assets is reserved for both children of the marriage to pay for their tertiary education.

(xix) RW's contention that she holds an indefeasible title to a half share in Valencia that cannot be disturbed by this court should be ignored. In *Lim Bee Cheng v. Christopher Lee Joo Peng* [1996] 2 CLJ 697; [1995] 4 MLRH 104, it was held:

> The power of the Court to order division of matrimonial assets under s. 76 is subject and subject only to those considerations prescribed therein and that conduct of the parties *via* spousal agreement is and has always been irrelevant.

So too in *Soo Ah Chong v. Tan Saw Cie & Ors* [1996] 1 LNS 538. Therefore the "indefeasible title" claim by RW does not in any way oust the jurisdiction of this court to compel her to transfer back her half share in Valencia to him.

(xx) I was referred to this court's decision in *Balakrishnan Kaliappan v. Shameena Nathesan* [2019] 7 CLJ 762; [2019] 5 MLRA 40, where it was observed that if parties intended for a property to be a matrimonial home/asset, it was quite common practice for one person to procure the loan from the bank but for two names to appear on the issue document of title. It was also held that the home where the

parties had resided for three years was not a matrimonial asset subject to division as it was purchased two years before the marriage by the sole effort of the petitioner wife. The Court of Appeal subsequently upheld this decision and said:

> We have intentionally used the words 'matrimonial home' and not "matrimonial property or asset" to describe this house which was registered under the wife's name and bought *vide* a sale and purchase agreement dated the 4th of March 2009 from one Wong Yoke Leng and Woo Choong @ Woo Choon Yuen, which was two years before the marriage was registered. This is simply because a matrimonial home may not necessarily be a matrimonial property or asset which the court has the power to order division of under s. 76(1) of the LRA in that a place where the parties cohabitated after the marriage may not be in their names, either solely or jointly but could be one which belongs to either of their respective families or even rented.

He argued that, though he had already transferred half share in Valencia to RW, be it as a gift or otherwise, it does not oust the jurisdiction of this court when asked to divide assets to subsequently inquire and determine if a particular asset is, in fact, a matrimonial asset. He submitted that this court to disregard his transfer of the half share to RW in dividing matrimonial assets under s. 76 of the LRA. With *Shameena Nathesan* (*supra*), and *Lim Bee Cheng* (*supra*), this court has the power to compel RW to transfer the half share back to him.

[9] PH referred to *Yap Yen Piow v. Hee Wee Eng* [2016] 1 LNS 1060; [2017] 1 MLRA 389, where the Court of Appeal held that:

> Section 76 of the LRA 1976 is the key statutory provision to deal with the division of the property. In principle, it differentiates assets acquired during the subsistence of marriage into three types. They are as follows:
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> (a) Any assets acquired by joint efforts which we have classified as matrimonial property. In this category, the court has an obligation to divide the assets (see s. 76(1) of the LRA 1976);
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> (b) Any assets acquired by one party by sole effort which we classify as non-matrimonial property. In this category, the court is not obliged to divide but may do so (see s. 76(3) of the LRA 1976); and
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> (c) Assets which were acquired before the marriage, but have been substantially improved by the other party or by their joint efforts. In this category, if there is no substantial improvement, the property is not subjected to division at all. In addition, if the property has been acquired before the marriage and subjected to a loan, the said property may not fall in that category (see s. 76(5) of the LRA 1976).

He argued that Valencia does not satisfy the nexus test set out in *Yap Yen Piow* (*supra*). It was not acquired for a current common purpose and/or enjoyment but instead for a future purpose as an investment to pay for the tertiary education of both children of the marriage. Therefore, Valencia is not a matrimonial asset subject to division pursuant to s. 76(1) or (2) of the LRA.

[10] PH further submitted that Valencia is also not subject to division under s. 76(5) of the LRA as the acquisition of the property was by the sole effort of PH before the marriage, and there was no substantial improvement done to it by RW after the wedding. Considering whether Valencia is a matrimonial asset or not, the court should also bear in mind that RW has been well provided for by the Abu Dhabi court's order.

Respondent Wife's Submission (RW)

[11] She objects to PH's application (encl. 12) as it contradicts what had already been agreed between them that upon registering the Abu Dhabi court's order for divorce in Malaysia, the only issue outstanding is the division of Valencia, but instead, he makes a turnaround and instead claims for the return of her half share in Valencia to him. This prompted her application in encl. 19 for ancillary relief under r. 56(2)(a) of the Divorce and Matrimonial Proceedings Rules 1980 ("DMPR 1980") and s. 107(3) and (4) of the LRA to sell Valencia between the price range of RM2.1m to RM2.4m or for him to buy out her half share at RM1.2m. Otherwise, she prays for an order for sale *via* public auction or otherwise to facilitate an end to this issue.

[12] She premised her application on the following:

(i) It is not a matter of dispute that Valencia was purchased by PH on 24 April 2007 before he married her. Renovation works were completed in April 2008.

(ii) The Chinese wedding ceremony was carried out on 2 November 2007, and their marriage was registered on 25 May 2009 after his divorce from his previous wife Sarah Chan was official.

(iii) Their first daughter was born on 9 May 2008, and they moved to Valencia on 9 June 2008.

(iv) He moved to Abu Dhabi in August 2008 to take up his job with Etihad Airways, and she and their daughter followed suit in November 2008 as suggested by him.

(v) The half share of Valencia was transferred to RW on 26 June 2010.

(vi) During the material time, she was employed as a manager with Air Asia, and he agreed that she doesn't need to continue working after having their first daughter. She resigns and takes care of the family, which contributes to the marriage as a housewife.

[13] Referring to s. 76(1) of the LRA, in the division of matrimonial assets, this court has to consider the extent of contributions made by each party in money or in kind by looking after the home or caring for the family, payment of expenses for the benefit of the family, any debts owing by either party which was contracted for their mutual benefit, the needs of the minor children and the duration of the marriage. Section 76(5) of the LRA provides that references to assets acquired during a marriage include assets owned before the marriage by one party, substantially improved during the marriage by the other party or by their joint efforts. In *Wong Chong Kiew v. Lee Hock Seng* [2019] 1 LNS 915; [2019] MLJU 637, it was held:

> Parliament in its wisdom has done away with the differentiation between the matrimonial and non-matrimonial assets in the division of any assets acquired by the parties during the subsistence of the marriage or in the division of the proceeds of sale of any such assets upon the decree of divorce or judicial separation. The necessity to prove "joint efforts" by both parties in the acquisition of the assets has also been dispensed with. In exercising the power to order the division of assets, the court would still have to take into account the factors as set out in paragraphs (a), (b) and (c) in subsection 76(2) LRA 1976 with the additional requirement in paragraph (aa), which is a mirror image of the now-deleted paragraph 76(4)(a), that the court must consider the extent of the contributions made by the other party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family. This latter consideration is a clear acknowledgment of the immensely important role played most often by women in striving to achieve the best quality of life for the family by routinely donning many different hats each day, as a partner and companion to the husband, a caring and loving mother to the children, a chief executive or director of household affairs, a manager or administrator of the family income, a chef, a teacher, a doctor, a domestic worker and a chauffeur to name but a few ... . The requirement that the court shall incline towards equality of division remains as the main guiding ... principle.
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> With the distinction between matrimonial and non-matrimonial assets having been done away with, ... include assets owned before the marriage by one party ... the Petitioner has to prove that such asset has been substantially improved during the marriage either by the Petitioner or by the joint efforts of the parties.

RW drew my attention to this court's decision in *Theynarasi Selambaram v. Periasamy Chinnappan & Anor* [2019] 1 LNS 818; [2019] MLJU 558, decided after the amendment of s. 76 of the LRA, which held:

> Since section 76 LRA has been amended and section 76(3) was deleted. Therefore, now the only non-matrimonial assets are as provided for under section 76(5) LRA. Section 76(5) provides that assets acquired during a marriage include assets owned before marriage by one party which have been substantially improved during the marriage or by their joint efforts. The Court of Appeal said joint efforts need not necessarily be in monetary

terms but should include consideration in kind. When it relates to matrimonial property (or home) i.e., the house (one or several) and all movable and immovable assets in the house or having nexus to the house, such as a car, etc. which is meant to be used by the family, the courts have generally acknowledged that it falls under the matrimonial property which will fall under Section 76(1) of the LRA 1976, provided it was acquired by the joint efforts of the spouses though one spouse may not have contributed in cash, but the consideration may have been in kind. Court of Appeal subsequently introduced a nexus test to be applied in determining the issue of matrimonial property. The nexus appears to be the enjoyment and use. If there is no enjoyment and/or use for the current common purpose, it will appear the nexus test may not be satisfied ... In the division of matrimonial assets, the law on division of matrimonial property is well settled as stipulated in Section 76(2) of the LRA 1976, whereby the court shall incline towards equality subject to statutory considerations ... Therefore, for matrimonial property, the division is of right ... .

In *Wong Kim Foong v. Teau Ah Kau* [1998] 1 CLJ 358; [1998] 1 MLJ 359, in reference to s. 340 of the National Land Code, the court said:

Now, s. 340 NLC would add a different complexion to the whole case. The party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land. That title will certainly be a title or an interest which is free from all adverse claims or encumbrances not noted on the register. In short, in the absence of any of the visiting factors laid down in s. 340 NLC, a title, once registered, is said to be indefeasible ... .

In *Yap Kim Swee v. Leong Hung Yin* [1986] 1 LNS 127, it was held:

... The property is currently registered in their respective names with each party holding a half share each, and by virtue of this alone and s. 340 NLC, the applicant has an indefeasible title to the property limited to her half share, and it is immaterial for the purpose of division of this property to consider whether she had contributed to its purchase at all.

[14] She further argued that:

(i) Valencia was bought as a matrimonial home where on 29 June 2010, a half share was transferred to her as his wife for love and affection.

(ii) As early as March 2007, he had decided to marry her.

(iii) Together with his mother, they went to look for a house, and they decided to buy Valencia at Sungai Buloh on 24 July 2007 as their matrimonial home.

(iv) The Chinese tea ceremony was held on 2 November 2007, where she was already pregnant with their first child by then.

A (v) His divorce from his first wife in the United Kingdom took a long time to be finalised, and it was only after that, that they were able to register their marriage on 25 May 2009.

(vi) They purchased Valencia before he was offered a job in Abu Dhabi, where they moved to live in Valencia on 9 June 2008 after the
B renovation work (for the master bedroom and their first child's room) was completed.

(vii) It was their plan all along to continue living there had he not been offered the job with Etihad Airways in Abu Dhabi.

C (viii) On 9 May 2008, she delivered their first daughter. He had every intention to marry her when Valencia was acquired as their matrimonial home. The claim that the renovation was done to draw the attention of their would-be tenant is untrue.

[15] RW also argued that:
D

(i) PH had bought an expensive golf set (Titleist) even though she has never seen him playing golf while they were together. If it is true that his hobby is playing golf, then that was the inspiration for him to buy Valencia, which has a golf course, where he has also joined as a
E member of the golf membership.

(ii) These facts, show his intention to buy Valencia as their matrimonial home.

(iii) It was purchased before he applied to work overseas, and she believed that he was not confident that he would be offered the job at Etihad
F Airways.

(iv) Had he known he would be working for Etihad in Abu Dhabi, he would not have bought and renovated Valencia. It was only after they had moved into Valencia that he got the offer to work as a pilot with Etihad Airways and start work in August 2008.
G

(v) Together with their first daughter, she followed to be with him in Abu Dhabi, and Valencia was kept as a permanent place once they moved back to Malaysia. That was the reason why they would never sell Valencia.

H (vi) She sacrificed her job and career to care for the family, and on 29 June 2020, two years after their move to Abu Dhabi, he transferred the half share of Valencia to her as his wife when their relationship was still good. The consideration is undeniably for love and affection as his wife and mother to his children.

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(vii) By asserting that Valencia was acquired to finance the said children's education is sufficient to support her contention that Valencia is a matrimonial asset. Referring to *Wong Chong Kiew* (*supra*), Valencia was purchased before they were married, and therefore the property was purchased for the enjoyment of the family as defined by s. 76(5) of the LRA.

(viii) Referring to *Theynarasi* (*supra*), Valencia qualifies as a matrimonial asset under s. 76(1) of the LRA as it has proven the nexus test of "enjoyment and use". The fact that she left her job to take care of the family during the marriage duration contributes to the matrimonial home.

(ix) PH's argument that there should be only one matrimonial home that can be divided, ie, the Al-Zeina in Abu Dhabi, is misplaced. Section 76 LRA provides that the court can divide any assets in the marriage.

(x) In the premise, Valencia falls within the category of asset under s. 76(1) of the LRA, therefore, should be divided equally between the parties.

[16] Citing *Wong Kim Foong v. Teau Ah Kau* (*supra*), RW asserts indefeasibility of her half share of title in Valencia. Whether she paid for it is immaterial in the circumstances as it was gifted by PH for love and affection. She argues that till now, she is unable to buy any house for her and the said children. They are presently living with her brother:

(i) To date PH has only paid AED258,075 (AED225,000 + AED33,075) as of October 2018 and not AED338,075 as averred by him.

(ii) He is not consistent in paying alimony and is still owing her AED25,000 every month since November 2018 to date.

(iii) She has to pay a high legal cost in Abu Dhabi, and if he is a responsible person, he should have sold the Al Zeina for her to get her half share, but he failed to do so.

(iv) PH is now living in the Al Zeina with his new wife and has just bought an expensive sports car.

[17] In her reply, RW distinguished several cases referred by PH, but I will only elaborate on the ones with similar facts to the present case. In *Lim Beng Chee* (*supra*), the decision was:

(i) The respondent purchased the property in his sole effort two years before they were married, and two years later, the respondent transferred his half share to the petitioner.

(ii) The petitioner did not plead that it was a wedding gift and the respondent explained that the half share was given as a cost-saving measure.

(iii) The case was decided pre-amendment of s. 76 of the LRA, and there is no need for minor children to be considered by the court. The only factor that the court had to consider under s. 76(4) is the extent of the other party's contribution who did not acquire the assets to the family's welfare by looking after the home or caring for the family.

(iv) The court noted that the marriage was only three years.

(v) The court ordered that the said property be sold off and the proceeds be divided equally. The property to be sold within three months from the date of the order at the current market value. On a fair and equitable ground, the court took note of the petitioner's effort to save the house from the auctioneer's hammer.

The facts of that case above can be applied in the present case as follows:

(i) As evidenced from RW's assertions, Valencia was acquired by PH in the view of his marriage to RW, where two years later, he transferred half share to RW. It is undeniably gifted to her for love and affection. Though parties no longer resided in that property since they lived in Abu Dhabi, it did not stop him from transferring it to her.

(ii) There are minor needs to be considered, ie, two daughters aged 12+ and 9+.

(iii) Parties were married for more than ten years. If parties did not move to Abu Dhabi, they would have continued to live in Valencia, where RW would raise the two children with or without a maid.

(iv) Her contribution to Valencia would have been in-kind, nurturing, and caring for the family as she had quit her job in AirAsia after giving birth to the eldest daughter.

(v) PH is now asking for the half share return because it was intended to secure the children's education (a bare assertion that I find to be misplaced and an afterthought).

(vi) PH averred that he purchased Valencia because he loves playing golf. All the more reason to support a conclusion that he intended to buy Valencia as a matrimonial home, which was before securing his job with Etihad Airways.

(vii) If minor children's need should be considered, then the property should be sold at current market value, where both parties contribute into a trust fund for that purpose.

(viii) In the circumstances, justice demands that this court exercises its discretion to hold that RW is entitled to her half share in Valencia, as was intended by parties. Valencia is considered a matrimonial asset.

In *Vikkaram Subramaniam* (*supra*), the decision was:

(i) The petitioner's father purchased the property, and it was refinanced under the petitioner's name before his marriage.

(ii) The respondent, in her pleadings, had acknowledged that there was no marital property acquired during the marriage.

(iii) The property belonged to the petitioner's father, who had refinanced the property under the petitioner's name long before the petitioner and the respondent's marriage.

(iv) Respondent stayed in the property for two weeks because she refused to stay in the same house as the petitioner's parents.

(v) These facts taken in totality would support an inference that it was never petitioner's intention to make it marital property.

The facts of that case above, when applied to the present case, showed that where there was marital enjoyment of the said property, it would support the inference that parties intended for it to be matrimonial property. In *Balakrishnan Kaliappan* (*supra*), the decision was:

(i) The property was registered solely in the wife's name, and it was never the intention to have the husband's name registered as the co-owner.

(ii) The court could not find enough evidence of substantial improvements by the husband.

(iii) If an asset is intended by the parties to be the matrimonial home, it is pretty standard practice for one person to procure the bank's loan but for the two names to appear on the issue document of title.

The facts of that case above, when applied to the present case, showed that:

(i) RW's name was later added on as half owner, and it still serves as the marital home as the transaction was during the marriage.

(ii) Contribution in kind such as the ones given by RW as a housewife, which later a half share was gifted to her constitutes a substantial factor in determining an asset as a marital asset.

In *Hii Chan Seng v. Aida Balingan Baron* [2011] 1 LNS 12, it was held:

(i) The property was acquired during the marriage; however, it was not registered in the wife's name.

(ii) The court ordered a 25% share of the house to the wife after considering the bank loan balance.

(iii) The court further ordered another 25% of another property to the wife, although the husband and his brother jointly owned that property.

A (iv) The principle the court relied on is partners in a marriage who acquire properties either as investments or for current use must be presumed to have intended it for the family's mutual benefit and not for their benefit alone.

B (v) In the end, the court was fair in granting the wife who only contributed in services alone a share of 50% in his properties although it was from two properties.

The facts of that case above, when applied to the present case, clearly showed that Valencia was being used for the enjoyment and marital needs (mutual benefit) of the family. On this consideration alone, it should be termed and C classified as a matrimonial asset.

[18] Learned counsel for RW argued further and said:

(ii) Whether Valencia will fall under s. 76(5) of the LRA or s. 76(1) of the LRA. RW submitted that assets owned before the marriage by one party D are assets that will fall under s. 76(5) of the LRA. *Wong Chong Kiew* (*supra*) held that the petitioner had to show that such assets had been substantially improved during the marriage either by the petitioner or by the parties' joint efforts. Joint efforts here would constitute petitioner's contribution in kind to the family.

E (ii) Though Valencia was acquired by PH before the marriage, it was bought with the joint intention for parties to live in it as their matrimonial home short of registering the wedding. There is a total admission of fact by PH that RW's marriage could not be registered until the divorce with his ex-wife Sarah Chan was finalised in the UK.

F (iii) Hence, both parties performed the customary marriage, moved in as husband and wife, and then RW gave birth to their eldest daughter. RW would have fulfilled the criteria of contributions in-kind to the family under s. 76(5) of the LRA as a homemaker, mother, and wife after giving up her AirAsia career.

G (iv) RW further submitted that Valencia falls under s. 76(1) of the LRA following the case of *Theynarasi* (*supra*), where the petitioner and respondent lived in Property A then moved to a bigger house called Property B. They resided in Property A after the customary marriage, H where they had immediately lived as husband and wife. In the present case, it is the same situation where both lived in Valencia as husband and wife after the customary marriage. Valencia is a matrimonial asset and must be divided equally between the parties.

[19] The application of indefeasibility of title in s. 340 NLC must be I considered in the present case since RW is a duly registered proprietor co-owner) of a half undivided share in Valencia. In the division of marital

assets under s. 76 of the LRA, the court always leans towards equality of division as the Legislature had intended. In *Wong Kim Foong v. Teau Ah Kau* (*supra*), referring the s. 340 of the NLC, the said case ruled:

> The party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land. That title will certainly be a title or an interest which is free from all adverse claims or encumbrances not noted on the register. In short, in the absence of any of the vitiating factors laid down in s. 340 of the NLC, a title, once registered, is said to be indefeasible ... .

Both parties have the right of possession and ownership of the matrimonial home within the amended s. 76 of the LRA parameters. Valencia is a matrimonial home in the circumstances of the case.

The Law

[20] The Law Reform (Marriage and Divorce) Act 1976 (Act 164) (LRA) provides as follows:

> 76. Power for Court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1), the court shall have regard to:
>
> (a) the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets or payment of expenses for the benefit of the family;
>
> (aa) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;
>
> (b) any debts owing by either party which were contracted for their joint benefit;
>
> (c) the needs of the minor children, if any, of the marriage;
>
> (d) the duration of the marriage, and subject to those considerations, the court shall incline towards equality of division.
>
> (3) (Deleted)
>
> (4) (Deleted)
>
> (5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

In *Yap Yen Piow v. Hee Wee Eng* [2016] 1 LNS 1060; [2017] 1 MLRA 389, the Court of Appeal held that:

> Section 76 of LRA 1976 is the key statutory provision to deal with the division of the property. In principle, it differentiates assets acquired during the subsistence of marriage into three types. They are as follows:
>
> (i) Any assets acquired by joint efforts which we have classified as matrimonial property. In this category, the court has an obligation to divide the assets (see s. 76(1) of the LRA 1976);
>
> (ii) Any assets acquired by one party by sole effort, which we classify as non-matrimonial property. In this category, the court is not obliged to divide but may do so (see s. 76(3) of the LRA 1976); and
>
> (iii) Assets which were acquired before the marriage but has been substantially improved by the other party or by their joint efforts. In this category, if there is no substantial improvement, the property is not subjected to division at all. In addition, if the property has been acquired before the marriage and subjected to a loan, the said property may not fall in that category (see s. 76(5) of the LRA 1976).

In *Balakrishnan Kaliappan v. Shameena Nathesan* [2019] 7 CLJ 762; [2019] 5 MLRA 40, the Court of Appeal held:

> We have intentionally used the words 'matrimonial home' and not "matrimonial property or asset" to describe this house which was registered under the wife's name and bought *vide* a sale and purchase agreement dated the 4th of March 2009 from one Wong Yoke Leng and Woo Choong @ Woo Choon Yuen, which was two years before the marriage was registered. This is simply because a matrimonial home may not necessarily be a matrimonial property or asset which the court has the power to order division of under s. 76(1) of the LRA in that a place where the parties cohabitated after the marriage may not be in their names, either solely or jointly but could be one which belongs to either of their respective families or even rented. The wife admitted that the husband paid for the deposit and solicitor's fees in respect of the purchase but which she paid back. The husband contended that he was not having a steady employment at that material time and therefore could not take up the loan in his name, and this was why he said the house was registered in the wife's name. However, in our view, this is not an acceptable reason for there is no legal impediment to register the property in their joint names even if what he said was true because, as alluded to by the learned Judicial Commissioner in her judgment. It is a known banking practice to register the property in joint names even though only one of the registered owners obtained financing of the property.
>
> It is, of course, specifically provided under s. 76(5) of the LRA that assets acquired during a marriage include the ones acquired before the marriage by one party but which "have been substantially improved during the marriage by the other party or by their joint efforts". Thus the fact that the house had been the place of cohabitation after the marriage, which

was an agreed fact at the trial, does not, with respect to learned counsel for the husband's written submission at para 19 thereof, that the husband has proprietary rights over it, even when taken with the fact that at that material time of the trial of the second petition, the husband was still residing in the house (see the agreed facts at p. 24 on the Core Bundle ... of the Documents).

In other words, the learned Judicial Commissioner was of the view that the acquisition of the house was by the sole effort of the wife before the marriage, and there was no substantial improvement to it by the husband after the marriage based on the evidence and considerations made above. These two factors are the express requirements of s. 76(5) of the LRA and as was cautioned by Abdul Hamid Mohamed JCA (as His Lordship then was) in *Sivanes Rajaratnam v. Usha Rani Subramaniam* [2002] 1 MLRA 178:

> The function of the court is to make a fair and equitable division of the matrimonial assets that exist at the time of the divorce, taking into consideration the factors laid down in s. 76 of the Act. It must be remembered that the court is dividing matrimonial assets and not assessing damages.
>
> In dividing matrimonial assets pursuant to a divorce, the courts in Malaysia should pay special attention to the provisions of the Act and not rely uncritically on decided cases from other jurisdictions except perhaps those from Singapore where the relevant law is similar. It is not advisable to rely ingenuously on English cases.

[21] Section 340 of the National Land Code (Act 56) (NLC) provides for the registration to confer indefeasible title or interest in land, as follows:

> 340. Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge, or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

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(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration or by any person or body claiming through or under such a purchaser.

B

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

C

(b) the determination of any title or interest by operation of law.

From the above provision, it is clear that the title's indefeasibility does not apply due to at least one of the three factors laid out in s. 340(2)(a), (b), or (c) of the NLC. Thus, the title can be defeated due to fraud or misrepresentation as stated under s. 340(2)(a) or where the registration is obtained under s. 340(2)(b) of the NLC by forgery, or employing an insufficient or void instrument or under s. 340(2)(c) if the title or interest was unlawfully acquired.

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Findings Of This Court

[22] In the present applications:

(i) PH had argued extensively why Valencia could not be considered a marital home. Instead, he asserts that Al-Zenia in Abu Dhabi is. However, it must be emphasised that Al-Zenia is not the subject matter in this proceeding. The said property in Abu Dhabi had already been duly determined between the parties by the Abu Dhabi court that had granted the parties divorce decree.

F

(ii) It is not disputed that PH purchased Valencia before his marriage to RW, and s. 76(5) of the LRA provides that references to assets acquired during a marriage include assets owned before the marriage by one party, which have been substantially improved during the marriage by the other party or by their joint efforts.

G

(iii) Strictly construing this provision, any property acquired before marriage can be considered as marital assets provided that the other party (the spouse who did not jointly purchase the asset) has substantially improved the said property or the said property was improved by their joint efforts. In the present case, it is also undeniable that RW did not improve the physical aspect of Valencia, but it is not disputed that her career sacrifices, efforts in caring for the family, and the family home constitute the joint efforts required to qualify as improving the asset. She gave marital life to the matrimonial home while the marriage lasted.

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(iv) Section 76(1) of the LRA empowers the court when granting a decree of divorce or judicial separation to apply equality in the division of matrimonial assets between the parties acquired during the marriage after considering the extent of contributions made by each party in money or in-kind.

(v) Applying s. 76(1) to the present case:

(i) Valencia was purchased before his marriage to RW, where he subsequently renovated it before moving in with her. This was just before the Chinese tea ceremony with RW while she was carrying their first child. The Chinese customary wedding registration under the LRA was delayed pending the finalisation of PH's divorce from his wife in the UK.

(ii) That notwithstanding, they moved in as a family; RW resigned from her job and became a full-time housewife taking care of the family, and gave birth to the first daughter, giving marital life use and enjoyment to this property, all this which when considered as a whole constitute her contribution in kind; they have two minor children and have been married for ten years. The duration of five months stay before moving to Abu Dhabi when taken with the facts leading to Valencia's purchase and after clarifies the intent and moving to Abu Dhabi to further the career of PH, does not alter this position of Valencia as a marital asset in the circumstances of the present case.

All things considered, the court shall, in the circumstances of this case, inclined towards equality of this asset's division as to hold otherwise would not be just.

In perusing all evidence adduced, I have further found as follows:

(vi) Section 101 of the Evidence Act 1950 (Act 56) provides:

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

In the arguments before the court:

(i) The single central assertion that PH makes is that he never had the intention to gift the half share in Valencia to RW. It was done only as security for his growing family and his job's risky nature as an airline pilot. I find that this is merely a bare averment with no evidence to support its veracity.

(ii) The consideration for the transfer was for "love and affection" and for tax benefits, as he affirmed it in his affidavit (encl. 13). It was purchased for investment purposes to be used to pay for their children's tertiary education. It is my observation that when the transfer took place on 29 June 2020, two years after the family moved to Abu Dhabi, this was never an issue, and neither was there any evidence that the transfer of the half share is subject to a covenant of this nature. As the consideration says in the statutory form (14A), it was for the transfer of land or share in the property, on love and affection, to attract nominal stamp duty as allowed by law for transfer to spouses and/or children. The evidence does not support the claim or facts by PH.

(iii) It is acknowledged that a profession as a pilot is a high risk one. Still, most if not all, are by law adequately covered by appropriate insurance either personally and/or with the employer. In this case, Etihad Airways is one of the world's premier airlines. Consequently, his claim is not probable.

(iv) If anything were to happen to PH, Valencia would still be inherited by the survivors (the children and RW). If it is for the children, why transfer at all since the law of property inheritance and succession applies to see to the children's welfare.

(v) To his detriment, by his admission in his affidavits and written submissions, he expresses displeasure that RW had been provided amply enough by order of the Abu Dhabi court in the divorce decree there in terms of cash and property, and she should not greed for more. Yet, it was he that had gifted the half share to her on love and affection. Now he questions and speculates (casting adverse aspersions) on her intention with the half share, which he has no right to. As the legally registered proprietor in the undivided half share in Valencia, she has the legal right to choose what to do with it and not subject to his wishes. Considering the foregoing, I hold PH's assertion to be an afterthought where the evidence/lack of it do not support the facts.

[23] Section 76 of the LRA did not distinguish between matrimonial home and matrimonial assets:

(i) See *Shameena Nathesan* (*supra*), where the Court of Appeal clarified that the court had intentionally used the term "matrimonial home" and not "matrimonial property or asset" to describe this house which was registered under the wife's name and bought *vide* a SPA which was two years before the marriage was registered.

(ii) A matrimonial home may not necessarily be a matrimonial property or asset which the court has the power to order division of under s. 76(1) of the LRA. Cognisance must be taken that where the parties cohabitated after the marriage may not be in their names, either solely or jointly but could be one which belongs to either of their respective families or even rented.

(iii) Merely proclaiming that Valencia is not caught either as a matrimonial home or matrimonial asset by PH but was independently an acquisition for investment purposes and the children's education's security does not support nor does it complement the facts before this court as set out above. It is a contradiction in terms. Still, learned counsel for PH applied for this court to invoke the power under LRA to compel the transfer of RW's half share to PH.

[24] As a duly registered proprietor of the half undivided share in Valencia, s. 340 of the NLC makes her title or interest indefeasible except when fraud or misrepresentation or registration was obtained by forgery or void instrument; or where it was unlawfully acquired. In the present case, there was no fraud, no misrepresentation, neither was the title obtained by forgery, and therefore, the title conveyed to RW is indefeasible, and her rights are protected under the scheme of the NLC. Under the NLC Torrens scheme, the Act provides statutory rights for registered property owners. PH is not allowed to come to the court (in the absence of compelling evidence to support his claim) to compel RW to transfer her half undivided share in Valencia back to him by the misplaced assumption that the family court can just order her to transfer back her half undivided share when there exists no legal basis to do so, and more so when PH cannot even substantiate his claim, relying solely on bare averments, and conjectures. He fails to satisfy s. 101 of the Evidence Act 1950. It is my considered view in the circumstances that the correct order is to order for the sale of Valencia by public or private auction to address this unnecessary deadlock with the proceeds of sale to be divided equally between the parties as registered proprietors of Valencia minus all expenses/costs incurred.

Conclusion

[25] All things considered, after closely scrutinising the applications and all related documents, affidavits, and written submissions, I dismissed part of encl. 12, and I allowed part of encl. 19 with no order as to costs.